

STATE OF MICHIGAN  
COURT OF APPEALS

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ELLA SUE PARKER,

Plaintiff-Appellant,

v

CONSUMERS POWER COMPANY,

Defendant-Appellee.

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UNPUBLISHED

February 5, 1999

No. 206221

WCAC

LC No. 93-000271

Before: Jansen, P.J., and MacKenzie and Markman, JJ.

JANSEN, P.J. (dissenting).

I respectfully dissent. I would reverse the decision of the Worker's Compensation Appellate Commission (WCAC) and reinstate the magistrate's decision that plaintiff was entitled to an open award of worker's compensation for her psychiatric disability.

I find that the WCAC has, yet again, exceeded the scope of its administrative review in reversing the magistrate's decision. The WCAC is required to engage in a qualitative and quantitative analysis of the evidence in order to ensure a full, thorough, and fair review. MCL 418.861a(13); MSA 17.237(861a)(13). Findings of fact made by the magistrate *shall* be considered conclusive by the WCAC if supported by competent, material, and substantial evidence on the whole record. MCL 418.861a(13); MSA 17.237(861a)(13). The WCAC's review is not de novo, and it may not simply substitute its findings for that of the magistrate. *Kovach v Henry Ford Hosp*, 207 Mich App 107, 111; 523 NW2d 800 (1994). If the magistrate's conclusion is derived from competent, material, and substantial evidence, then the WCAC may not substitute its judgment for that of the magistrate notwithstanding either the reasonableness or the adequacy of the WCAC's conclusion. *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507, 514; 563 NW2d 214 (1997). Our Supreme Court has summarized the analysis as follows:

If the magistrate's decision is reasonably supported in the record by any competent, material, and substantial evidence, then it is conclusive and the WCAC must affirm. If it does not, it is exceeding the scope of its reviewing power and impermissibly substituting its judgment for the magistrate's. In reviewing the magistrate's decision, the WCAC must do so with sensitivity and deference toward the findings and conclusions

of the magistrate in its assessment of the record. If in its review the WCAC finds that the magistrate did not rely on competent evidence, it must carefully detail its findings of fact and the reasons for its findings grounded in the record. If after such careful review of the record the WCAC finds that the magistrate's determination was not made on the basis of substantial evidence and is therefore not conclusive, then it is free to make its own findings. In such circumstances, the findings of fact of the WCAC are conclusive if the commission was acting within its powers. Ultimately, the role of the Court of Appeals and [the Supreme] Court is only to evaluate whether the WCAC exceeded its authority. [*Id.*, p 538.]

On judicial appellate review, this Court decides whether the WCAC acted properly by considering whether there were issues of credibility of live witnesses to be determined by the magistrate, the evidence considered and ignored by the magistrate and the WCAC, the care taken by the magistrate and the WCAC, and the reasoning and analysis of the magistrate and the WCAC. *Holden v Ford Motor Co*, 439 Mich 257, 268; 484 NW2d 227 (1992). The decision of the WCAC should be upheld if it appears that the WCAC carefully examined the record, was duly cognizant of the deference to be given to the decision of the magistrate, did not misapprehend or grossly misapply the substantial evidence standard, and gave an adequate reason grounded in the record for reversing the magistrate. *Id.*, p 269. Ultimately, the role of this Court is to determine whether the WCAC acted in a manner consistent with the concept of administrative appellate review that is less than de novo review in finding that the magistrate's decision was or was not supported by competent, material, and substantial evidence on the whole record. *Goff, supra*, p 516; *Holden, supra*, pp 267-268.

I agree with plaintiff that the WCAC was not duly cognizant of the deference to be given to the decision of the magistrate, particularly in matters concerning credibility, and that the WCAC grossly misapplied the substantial evidence standard. The WCAC has done nothing more in this case than substitute its judgment for that of the magistrate. The magistrate, who had the opportunity to actually see and hear plaintiff's testimony, specifically found plaintiff to be a credible witness. The magistrate also found that the weight of the evidence established a work related disability based on actual events of employment. In this regard, the magistrate found that the testimony of one of plaintiff's coworkers, Evelyn Broxholm, was more credible than any of defendant's witnesses. The magistrate then found that Jay Pozner, PhD, established the relationship between plaintiff's inability to continue working and her aggravation of her "characterological weaknesses." The magistrate specifically found:

I find that personal problems also contributed to plaintiff's overall stress in 1989, but by November of 1990, her inability to work was the direct result of her treatment at work as described in detail above. Plaintiff had personal problems, though she denied them at trial. She lost some credibility by those denials. However, her work stressors were the major contributing factor to her inability to work by November, 1990.

The WCAC, in reversing the magistrate, decided that the magistrate failed to properly apply MCL 418.301(2); MSA 17.237(301)(2)<sup>1</sup> because the magistrate failed to thoroughly evaluate the nonoccupational factors regarding plaintiff's psychiatric disability. The magistrate's opinion, as quoted

above, directly refutes the WCAC on this point. It is clear that the magistrate did consider all stress factors, both work related and nonoccupational, in the opinion. Thus, the WCAC's conclusion that the magistrate failed to consider the nonoccupational factors is wrong and not supported by the record.

The WCAC also stated that there was no reasonable basis for the magistrate's choice of the testimony of Jay Pozner, PhD, over the testimony of defendant's medical expert, Harvey G. Ager, M.D. This represents yet another opinion where the WCAC has simply set aside the magistrate's finding and substituted its own preferred finding. However, this is not the type of administrative appellate review contemplated by MCL 418.861a(3); MSA 17.237(861a)(3) (findings of fact made by the magistrate shall be considered conclusive by the WCAC if supported by competent, material, and substantial evidence on the whole record). In this regard, the magistrate specifically found that at least some of plaintiff's complaints of harassment and increased work demands were not at all trivial or misperceived, as indicated to the contrary in Dr. Ager's report. Thus, the magistrate's decision to favor the testimony of Dr. Pozner over Dr. Ager is entirely supportable by competent, material, and substantial evidence on the whole record, especially in considering that the magistrate found that plaintiff's and Broxholm's testimony was credible.

Further, the WCAC's opinion completely overlooks the magistrate's specific findings that plaintiff's and Broxholm's testimony was credible, and largely rejecting defendant's witnesses. Moreover, the WCAC never addressed the magistrate's factual finding that plaintiff suffered actual, non-trivial harassment and extraordinary job pressure at work. The WCAC attempted to dismiss the employment harassment and pressure as being "misperceptions" by plaintiff, but this finding is completely unsupportable, especially where the magistrate found plaintiff to be a credible witness and where the magistrate found Broxholm, who largely supported plaintiff's claim, to also be credible. The WCAC does not even mention Broxholm's testimony or the magistrate's finding in this regard in its opinion.

The WCAC has, yet again, exceeded its reviewing authority in this case and improperly substituted its own judgment for that of the magistrate where the magistrate's factual findings are supported by competent, material, and substantial evidence on the whole record. See *Goff, supra*, pp 513-514; *Van Deusen v Tri-County Distributing, Inc (On Remand)*, 227 Mich App 558, 568-572; 576 NW2d 691 (1998)<sup>2</sup>; *Illes v Jones Transfer Co (On Remand)*, 213 Mich App 44; 539 NW2d 382 (1995); *Kovach v Henry Ford Hosp*, 207 Mich App 107; 523 NW2d 800 (1994). In this case, the WCAC did ignore important evidence and factors considered by the magistrate, cf. *York v Wayne Co Sheriff (On Remand)*, 227 Mich App 514, 518; 576 NW2d 436 (1998), did not defer to the findings and conclusions of the magistrate in assessing the record, and impermissibly substituted its own judgment for that of the magistrate. *Goff, supra*, p 538. Further, contrary to the WCAC's finding, plaintiff proved a mental disability arising out of the actual events of employment that aggravated her mental disability in a significant manner, as was found by the magistrate through plaintiff's, Broxholm's, and Pozner's testimony. *Corbett v Plymouth Twp*, 453 Mich 522, 553-554; 556 NW2d 478 (1996); *Gardner v Van Buren Public Schools*, 445 Mich 23; 517 NW2d 1 (1994).

Accordingly, I would reverse the decision of the WCAC and reinstate the magistrate's award of benefits.

/s/ Kathleen Jansen

<sup>1</sup> This statute provides that mental disabilities are compensable if contributed to or aggravated or accelerated by employment in a significant manner. Mental disabilities are compensable when arising out of actual events of employment, not unfounded perceptions thereof.

<sup>2</sup> Our Supreme Court peremptorily reversed the majority's decision in this opinion and reinstated the magistrate's award of benefits, citing *Goff, supra*, pp 513-514. *Van Deusen v Tri-County Distributing, Inc*, 459 Mich 893 (1998).